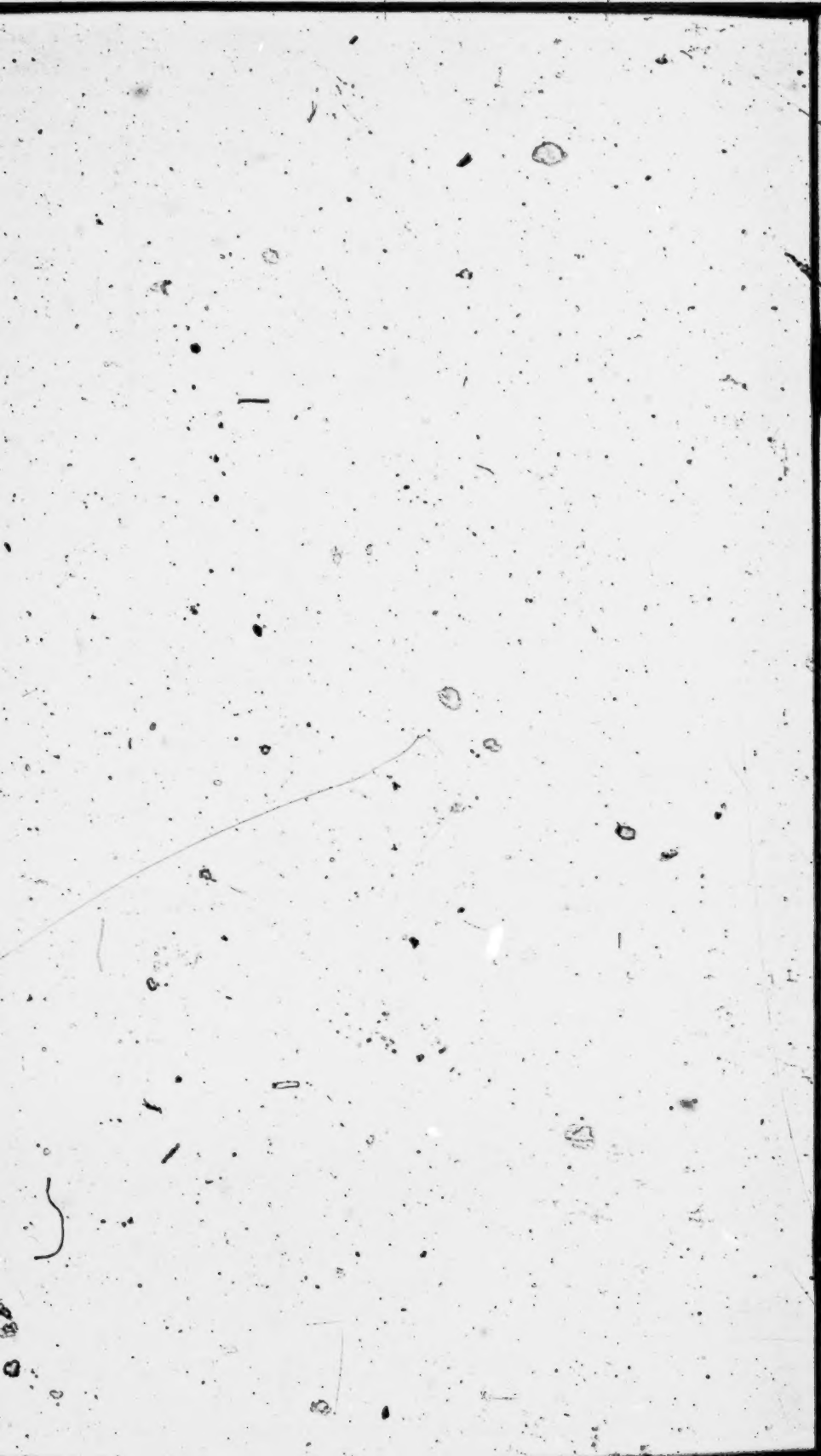

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 748

THORNTON A. JENKINS,

Petitioner,

against

THE STATE OF DELAWARE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

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BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

Question Presented

Should the standards of *Miranda* v. *Arizona*, 384 U. S. 436 and *Escobedo* v. *Illinois*, 378 U. S. 478 be retrospectively applied on retrials to the admission of voluntary confessions exempt from those standards under *Johnson* v. *New Jersey*, 384 U. S. 719?

Interest of *Amicus*

The granting of certiorari in this case brings before the Court the question of whether the admissibility of voluntary confessions validly introduced at trial before June

13, 1966, the date of this Court's decision in *Miranda*,* should be affected by the explicit standards set forth in that opinion if the defendant is retried thereafter.

As chief law enforcement officer for the State, the New York Attorney General is concerned with the effect which an adverse decision would have upon a substantial number of criminal convictions. New York is one of the seven states** whose highest court has held that the standards of *Miranda* do not govern the admissibility of confessions in such cases.

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* The applicability of the decisions in *Miranda* v. *Arizona*, 384 U. S. 436 and *Escobedo* v. *Illinois*, 378 U. S. 478 to retrials after June 13, 1966 and June 22, 1964, respectively, present the same issue. Because the decision in *Miranda* is so much broader in scope, we will refer to the general question as the applicability of *Miranda*.

** The States whose courts have so held are as follows:

Delaware:	*Jenkins* v. *State*, 230 A. 2d 262 (Sup. Ct. Del. 1967); *Jenkins* v. *State*, 240 A. 2d 146 (Sup. Ct. Del. 240 A. 2d 146).
Illinois:	*People* v. *Worley*, 37 Ill. 2d 439, 227 N. E. 2d 746 (Sup. Ct. Ill. 1967).
Maryland:	*Boone* v. *State*, 3 Md. A. 11, 237 A. 2d 787 (Ct. of Spec. App. Md. 1968), *cert. denied*.
New Jersey:	*State* v. *Vigliano*, 50 N. J. 51, 232 A. 2d 129 (Sup. Ct. N. J. 1967).
New York:	*People* v. *Sayers*, 22 N. Y. 2d 571, 240 N. E. 2d 540 (Ct. App. N. Y. 1968).
North Carolina:	*State* v. *Branch*, 1 N. C. App. 279, 161 S. E. 2d 492 (Ct. App. N. C. 1968); *State* v. *Lewis*, 1 N. C. App. 296, 161 S. E. 2d 497 (Ct. App. N. C. 1968).
Tennessee:	*Murphy* v. *State*, 426 S. W. 2d 509 (Sup. Ct. Tenn. 1968); *Patten* v. *State*, 426 S. W. 2d 503 (Sup. Ct. Tenn. 1968).

Eight states have made a contrary determination. They are as follows:

Alabama:	*Smith* v. *State*, 210 So. 2d 826 (Sup. Ct. Ala. 1968).

(Footnote continued on following page)

Like the other state courts which have made this decision, the New York courts have relied on the non-applicability of *Miranda* in reversing subsequent cases. A larger number of such cases exist than might be imagined since the rapid changes which are occurring in every area of criminal law and procedure have resulted in a great many reversals of criminal convictions particularly in states which are sensitive to the rights of defendants and to demands for improvements in the criminal process.

(*Footnote continued from previous page*)

Arizona: *State* v. *Brock*, 101 Ariz. 168, 416 P. 2d 601 (Sup. Ct. Ariz. 1966).

California: *People* v. *Doherty*, 59 Cal. Rptr. 857, 429 P. 2d 177 (Sup. Ct. Cal. 1967); *People* v. *Collins*, 66 Cal. Rptr. 497, 438 P. 2d 33 (Sup. Ct. Cal. In Bank 1968); but see *People* v. *Jackson*, 60 Cal. Rptr. 248, 429 P. 2d 600 (Sup. Ct. Cal. In Bank 1967).

Hawaii: *State* v. *Ruiz*, 49 Haw. 504. 421 P. 2d 305 (Sup. Ct. Haw. 1966).

Indiana: *Dell* v. *State*, 231 N. E. 2d 522 (Sup. Ct. Ind. 1967); *Beck* v. *State*, 235 N. E. 2d 699 (Sup. Ct. Ind. 1968).

Kansas: *State* v. *McCarther*, 197 Kan. 279, 416 P. 2d 290 (Sup. Ct. Kan. 1966).

Kentucky: *Creech* v. *Commonwealth*, 412 S. W. 2d 245 (Ct. App. Ky. 1967).

Wisconsin: *State* v. *Shoffner*, 31 Wis. 2d 412, 143 N. W. 2d 458 (Sup. Ct. Wis., 1967).

The question has not been considered in any reported case in Rhode Island. However, in reversing a conviction on other grounds the Court stated that it did not reach the question of whether *Miranda* applied on retrial, but indicated that it might so hold. *State* v. *Bradshaw*, 221 A. 2d 815, 817 n. 1 (Sup. Ct. R. I. 1966).

Five Circuit Courts of Appeals have held that *Miranda* does apply on retrial. They are as follows:

Third Circuit: *Virgin Islands* v. *Lovell*, 378 F. 2d 799 (3rd Cir. 1967); also see *United States ex rel. Pierce* v.

(*Footnote continued on following page*)

Thus, in New York a considerable number of cases would be directly affected by this Court's reversal of the decision of the Delaware Supreme Court.

The New York Attorney General has appeared either as counsel or *amicus* in several of the cases dealing with the applicability to earlier convictions of newly developed rules enunciated by this Court. *Linkletter* v. *Walker*, 381 U. S. 618; *Angelet* v. *Fay*, 381 U. S. 643; *Johnson* v. *New Jersey*, 384 U. S. 719; *Stovall* v. *Denno*, 388 U. S. 293. Also see *People* v. *McQueen*, 18 N. Y. 2d 337, 274 N.Y.S. 2d 886, 21 N. E. 2d 550 (1966) in which the Court of Appeals held that it would not give retrospective application to this Court's decisions in *Miranda* and *Escobedo*. Consistent with our position in those cases, we urge in this brief that the Court adhere to its reasoning in *Johnson* v. *New Jersey* not to disturb prior convictions in light of the specific standards newly enunciated in *Miranda* and not to require that those standards be applied to past convictions merely because a retrial is ordered. This brief is limited to that question and does not deal with the specific facts of the instant case or the Fourth Amendment issue presented therein.

(*Footnote continued from previous page*)

Pinto, 259 F. Supp. 729 (D.C.N.J. 1966), *aff'd per curiam* 374 F. 2d 472 (3rd Cir. 1967) *rev'd* 389 U. S. 31 (1967); but see *Vigliano* v. *Thevos*, 390 F. 2d 55 (3rd Cir. 1968).

Fourth Circuit: *Moorer* v. *South Carolina*, 368 F. 2d 458 (4th Cir. 1968).

Fifth Circuit: *Gibson* v. *United States*, 363 F. 2d 146 (5th Cir. 1966).

Seventh Circuit: *United States* v. *Phillips*, 401 F. 2d 301 (7th Cir. 1968).

Ninth Circuit: *Amsler* v. *United States*, 381 F. 2d 37 (9th Cir. 1967); *United States ex rel. Walker* v. *Young*, 388 F. 2d 675 (9th Cir. 1968).

ARGUMENT

The strict standards of *Miranda* should not be applied to retrials in cases originally tried before June 13, 1966.

In limiting the effect of *Miranda* v. *Arizona*, 384 U. S. 436 to cases whose trials began after June 13, 1966 this Court created a finite identifiable group of confessions whose admissibility was to be determined by "meticulous" (*Johnson* v. *New Jersey*, 384 U. S. 719, 730), standards of voluntariness, but not by *Miranda's* positive regulations for in-custody interrogation. As of June 13, 1966 any defendant, defense lawyer, prosecutor or judge could determine whether the admissibility of a confession would be judged by the standards of *Miranda* or on voluntariness alone. The discrete group of confessions exempt from *Miranda* were frozen as of June 13.

Petitioner Jenkins, whose trial began on January 10, 1966, knew after reading *Johnson* v. *New Jersey* that his confession was to be judged on the basis of voluntariness. To disturb that position would create unnecessary confusion in the administration of justice and violate the very purpose of this Court's decision in *Johnson* v. *New Jersey*, *supra*. That purpose was to limit the burden created by the revolutionary standards in *Miranda* on the administration of justice and on law enforcement officers who had justly relied on previous delineations of constitutional requirements. Few if any jurisdictions had fully met these standards previously. *Johnson* v. *New Jersey*, *supra* at 731. The purpose of *Miranda*, itself, was to set minimum constitutional standards for in-custody interrogation. Obviously, this decision looked to the future rather than to the past.

The confession which is the subject of the instant case was made on March 17, 1965. The case of which it is a part was first investigated and put before the jury begin-

ning on January 10, 1966. In *Johnson* v. *New Jersey, supra*, this Court specifically held that the admissibility of Jenkins' confession at trial was to be judged on the basis of voluntariness alone. Application of the *Miranda* rule cannot change the interrogation which has already occurred nor expand the investigation to produce other evidence as a substitute for the allegedly invalid confession.

The reasons which prompted this Court to limit retroactive application of several of its recent decisions* requires those limitations be absolute and not subject to change. In the present era of revolution in the criminal law it would discourage state courts and lower federal courts from continuing to expand concepts of fairness to criminal defendants if they knew that reversal of a case would further jeopardize the prosecution. This is not merely an academic observation, for most of the courts which have dealt with the applicability of *Miranda* on retrial have been aware of the effect of their decisions on the future prosecution of the defendant, since they predicted the problem on the reversal of the original trial rather than on the appeal from retrial. Of the 25 cases which have dealt with the issue of whether *Miranda* ought to apply on retrials, that question was decided by the jurisdiction before retrial in 20. In two of those cases the decision of whether to apply *Miranda* was made at the request of the prosecutor. *People* v. *Worley, supra; Smith* v. *State, supra.* In one case the decision was made after a pre-retrial motion to suppress the confession. *People* v. *Say-*

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* *Linkletter* v. *Walker*, 381 U. S. 618 (limiting the effect of *Mapp* v. *Ohio*, 367 U. S. 643); *Tehan* v. *Shott*, 382 U. S. 406 (limiting the effect of *Griffin* v. *California*, 380 U. S. 609); *Johnson* v. *New Jersey*, 384 U. S. 719 (limiting the effect of *Miranda* v. *Arizona*, 384 U. S. 436 and *Escobedo* v. *Illinois*, 378 U. S. 478); *Stovall* v. *Denno*, 388 U. S. 293 (limiting the effect of *United States* v. *Wade*, 388 U. S. 218 and *Gilbert* v *California*, 388 U. S. 263); *DeStefano* v. *Woods*, 392 U. S. 631 (limiting the effect of *Duncan* v. *Louisiana*, 391 U. S. 145 and *Bloom* v. *Illinois*, 391 U. S. 194); *Fuller* v. *Alaska*, 393 U. S. 80 (limiting the effect of *Lee* v. *Florida*, 392 U. S. 378.

ers, supra. In only four cases was the decision made after retrial. *United States* v. *Phillips, supra; State* v. *Lewis, supra; Murphy* v. *State, supra; Boone* v. *State, supra.*

The principal rationale for holding that *Miranda* should apply on retrial is reliance on the word "trial" in the *Johnson* opinion:

> "We hold that *Escobedo* attacks only those cases in which the trial began after June 22, 1964, the date of that decision. We hold further that *Miranda* applies only to cases in which the trial began after the date of our decision one week ago [June 13, 1966]". 384 U. S. 719, 721.

Indeed, most of the decisions which have applied *Miranda* to retrials have involved little or no discussion of the issue and looked no farther than that word "trial". The only case so holding that involves any discussion of the question is *People* v. *Doherty, supra* in which California applied *Miranda* to retrials. Of course, it should be remembered that California had anticipated the *Miranda* rules in *People* v. *Dorado,* 62 Cal. 2d 338, 42 Cal. Rptr. 169, 398 P. 2d 361 (Sup. Ct. in Bank, 1965) which was applied retroactively to cases on direct appeal. *In re Lopez,* 62 A. C. 380, 42 Cal. Rptr. 188, 398 P. 2d 380, 383 (Sup. Ct. Cal. 1965). By contrast, in four of those 13 courts dissenting opinions discussed the issue fully. *State* v. *Shoffner, supra,* 143 N. W. 2d 458, 475; *State* v. *Brock, supra,* 416 P. 2d 601, 605; *State* v. *McCarther, supra,* 416 P. 2d 290, 296; *People* v. *Doherty, supra,* 59 Cal. Rptr. 857, 866. There also is very complete discussion of the issues in all of the cases which held that *Miranda* does not apply on retrial. *People* v. *Sayers, supra, State* v. *Branch, supra, Murphy* v. *State, supra, Vigliano* v. *Thevos, supra, Boone* v. *State, supra.* But see two dissents *People* v. *Sayers, supra,* 240 N. E. 2d at 543 (based on the opinion of the Appellate Division below. *People* v.

Sayers, 28 A. D. 2d 227, 284 N.Y.S. 2d 481-2 [3rd Dept. 1967]); *Boone* v. *State, supra*, 237 A. 2d 787, 803.

In the cases holding that *Miranda* should not apply on retrial, courts have pointed to other language in *Johnson* which supports their interpretation. For instance, the reference to "future defendants" as opposed to "past defendants" (*Id.* at 732) has frequently been cited. It has also been suggested that retrial does not represent the inception of a new case for purposes of determining whether defendant has twice been put in jeopardy and therefore should not be the inception of a new case for purposes of expanding the retrospective application of *Miranda*. *Patten* v. *State, supra*, 426 S. W. 2d 503, 505; *State* v. *Shoffner, supra*, 143 N. W. 2d 458, 475.

While it is true that a number of jurisdictions have held that *Miranda* applies to retrials (see note at pp. 2-4). If this Court affirms the decision below it would not necesarily alter the independent determination by other jurisdictions to apply *Miranda*. In *Johnson* v. *New Jersey* this Court specifically reserved the power of the states to ". . . apply those standards in a broader range of cases than is required by this decision."

In any case, it is the logic not the language of *Johnson* v. *New Jersey* which is essential in determining the extent to which *Miranda* and *Escobedo* are to be applied retrospectively. Of course, the purpose of the cut-off date in *Johnson* was to limit retrospectivity even more stringently than was done in *Linkletter*. Then see *Stovall* v. *Denno*. In *Johnson* this Court held that the purpose of the *Miranda* rule will not be defeated if it were to be applied only to "future defendants". Since its primary aim was to change the circumstances in interrogation its purpose cannot be achieved at all in applying the decision retrospectively.

The reliance of law enforcement officers on the previously enunciated standards of voluntariness have been well

described in this Court's decision in *Johnson* v. *New Jersey, supra,* at 731-3. That reliance is in no way altered because retrial is ordered for independent reasons. Indeed, it is likely that the dependence on the confession in such cases would be increased because of whatever defect caused the reversal in the first place.

In the interrogation, in the investigation in chief, and in the preparation for trial, the confession was undoubtedly an integral part of the prosecution's case. Other evidence may have been a direct result of this voluntary confession. It is difficult enough to re-present a case on retrial, sometimes years after the events in question, without having to excise significant portions of reliable evidence.

This Court in *Johnson* held that the meticulous standards of voluntariness were sufficient protection to "past defendants". If anything, this is more true of defendants who will be subject to retrial. They may well have an opportunity to challenge the voluntariness of the confessions at least if the prior determination has been faulty in any respect. See dissent in *People* v. *Sayers, supra,* 284 N.Y.S. 2d at 483. Furthermore, their claims have been thoroughly decided by the Court which was careful enough to reverse their convictions.

In the courts which held that *Miranda* was inapplicable to retrial, the reversing courts did consider contentions that the admissions were improperly obtained. However, in 10 cases ruling the other way, the reversing courts refused to consider attacks on the confessions because they would either be inadmissible under *Miranda* or at least had to be reconsidered in light thereof. *Moorer* v. *South Carolina; United States ex rel. Walker* v. *Young; United States* v. *Phillips; State* v. *Shoffner; State* v. *McCarther; State* v. *Ruiz; Creech* v. *Commonwealth; State* v. *Jackson; People* v. *Doherty; Dell* v. *State; Smith* v. *State.* It is therefore possible that certain of these confessions were inad-

missible under either standard (see, *e.g.*, *People* v. *Doherty*, *State* v. *McCarther*, in which certain admissions were declared invalid) and that the casual adoption of the rule applying *Miranda* to retrials avoided a more difficult decision in the particular case in which it was enunciated.

Indeed, it is possible that the confession could have produced other evidence which might be similarly inadmissible as fruit of the poisoned tree *People* v. *Jackson*, *supra*, 429 P. 2d 600, 603. Cf. *People* v. *Chapman*, 67 Cal. Rptr. 601 (Ct. App., 2d Dist. Div. 4, 1968). Thus it can be assumed that retrial would be impossible in a substantial number of cases if the *Miranda* rules were applied. For instance, in *People* v. *Sayers*, 22 N. Y. 2d 571, 240 N. E. 2d 540 (Ct. App. N. Y. 1968), the case in which the New York Court of Appeals held that *Miranda* did not apply to retrials, the District Attorney had appealed the suppression of the confession. In order to do this under Code of Criminal Procedure §§ 518(6), 518-a he was required to affirm under oath that trial would be impossible without the use of the confession. Another instance where retrial would be impossible without the confession in question is presented by the Maryland case, *Boone* v. *State*, *supra*. Defendant Boone was indicted with three other persons charged with felony murder. His trial was severed from that of his co-defendants and he was granted a change of venue. The jury returned a verdict of guilty of murder, without specifying the degree, in that trial which took place before the decision of this Court in *Miranda*. A new trial was granted and held after *Miranda*. The evidence against him consisted of testimony of one of his co-defendants which was corroborated by a substantial amount of evidence. The Court on retrial had applied the standards of *Miranda* and had suppressed Boone's confession which had previously been found to be voluntary. On appeal the Court of Special Appeals held that without the confes-

sion there was insufficient corroboration of the identity of Boone. However, it held that the court below had erred in suppressing the confession and established Maryland's rule that *Miranda* should not apply on retrials.

In *Johnson* v. *New Jersey, supra,* this Court held that the procedure for testing the voluntariness of a confession was adequate "to protect the integrity of the truth-determining process : . . .". *Id.* at 729. Courts and prosecutors have relied on this procedure in cases tried before June 13, 1966. As this Court specifically indicated in *Johnson v. New Jersey, supra,* the standards of voluntariness have become stricter in recent years (*Id.* at 730). In many of the cases which will be affected by the rule which this Court adopts in this case the admissibility of the confession has been considered in more than one proceeding. In particular, the decision of this Court in *Jackson* v. *Denno,* 378 U. S. 368 required a new hearing in a large number of cases. That decision is of particular significance when read in the light of *Johnson* v. *New Jersey.* It requires a severable legal determination on the issue of voluntariness of the confession. Therefore, if the standards of *Jackson* v. *Denno* have been met at the original trial there would be no necessity of redetermining the admissibility of the confession on retrial. See Justice Herlihy's dissent in *People* v. *Sayers, supra,* 284 N.Y.S. 2d 481, 482. Combined with the meticulous test of voluntariness and the severability of that proceeding from the trial in chief there is no reason to eliminate previously admissible confessions merely because a case is ordered retried.

There is only one valid distinction between general retrospective application of *Miranda* and the specific retrospective application of *Miranda* on retrials. That is the scope of its interference with the administration of justice. This distinction was made by the California Supreme

Court in *People* v. *Doherty*, *supra*, 59 Cal. Rptr. 857 at 863. Since California had already adopted the *Miranda* rule, the burden on the administration of justice in that state was considerably less than that experienced in other states. Furthermore, subsequent developments in the criminal law have increased the likelihood of retrials which would be affected by this rule. We are in a period of convulsive change in criminal practice. There is practically no area of criminal law which is not experiencing dramatic changes. Thus, reversals and subsequent retrials in this area have become increasingly common.

The cases cited in the note on pp. 2-4, *supra*, offer interesting examples of the span of issues on which reversal in criminal cases may be based. They range from technical questions of the number of jurors in the jury room (*Patten* v. *State**) to substantial questions of an appropriate insanity rule (*State* v. *Vigliano*; *State* v. *Shoffner*). The other errors for which the original trials were reversed are: an impermissibly low sentence (*Murphy* v. *State*); the failure to give the defendants the names of the jurors before selection and the number of challenges afforded to them (*Amsler* v. *United States*); the jury's failure to specify whether a verdict was for first or second degree murder (*Boone* v. *State*); the introduction of an admission by a principal of a crime against the defendant in his trial as an aider and abettor (*Dell* v. *State*); the admission of records of a co-defendant's guilty pleas when he took the stand (*State* v. *Jackson*); improper cross-examination of one defendant—convictions of the two defendants reversed (*People* v. *Sayers*); evidence on a second count introduced against a co-defendant in a joint trial without instructing

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* Because all the cases listed hereafter are cited in the footnote at pp. 2-4, *supra* and in the Table of Cases, no citation reference is given in the text.

the jury that the defendant had been acquitted of that charge (*United States* v. *Phillips*); excessive cross-examination of a defendant about prior crimes (*People* v. *Worley*); introduction of hearsay testimony (*Gibson* v. *United States*); miscellaneous trial errors (*United States ex rel. Walker* v. *Young*); reference by prosecutor to evidence outside the record (*Smith* v. *State*); denial of motion to produce police officer's report (*State* v. *Bradshaw*); reversal for hearing as to whether disclosure of certain government reports should be required in a territory under the supervisory power of the Court of Appeals (*Virgin Islands* v. *Lovell*); reference in opening to a confession which was not introduced (*Moorer* v. *South Carolina*); erroneous instructions on murder count (*Jenkins* v. *Delaware; State* v. *Brock*); plain error in finding of fact by the trial court (*State* v. *Ruiz*); non-representation by counsel in a 20 year old conviction (*State* v. *Branch*). Two of the cases were reversed solely on grounds relating to other confessions which would require redetermination of the admissibility of confessions in any event (*People* v. *Doherty; State* v. *McCarther*).

It also may be expected that many retrials will be ordered on the basis of this Court's decision in *Bruton* v. *United States*, 391 U. S. 123 which was declared retroactive in *Roberts* v. *Russell*, 392 U. S. 293. While the breadth of the decision in *Bruton* is still subject to question,* many cases have been reversed on that ground, each of which involves the confession of a least one defendant. For instance in New York alone, at least 14 reported cases

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* The question is raised in another case before this Court this Term. *People* v. *Bosby*, 64 Cal. Rptr. 159 (1967), cert. granted November 19, 1968, sub nom. *Harrington* v. *California*, No. 750 OT 1968, 37 L. W. 3185

have recently been reversed and retrials ordered.* The New York courts have been liberal in reversing the convictions of the confessing co-defendants in Bruton cases. See, *e.g. People* v. *Baker, supra; People* v. *Balatnicov, supra.*

From this sample it can be interpolated that many hundreds of cases which were originally tried before *Miranda* will be ordered retried in the future. As major changes occur in the criminal law and modifications are made thereon it can be expected that many previous trials will be affected and even rules which have occurred before the original trial may well not have been assimiliated by prosecutors, defense lawyers and the courts.

In fact, some cases are reversed on collateral attack and therefore raise a question as to the meaning of *Linkletter* v. *Walker*, 381 U. S. 618 as well as to the meaning of *Johnson* v. *New Jersey*. In *Linkletter* this Court held that the decision in *Mapp* v. *Ohio* was not to be applied to cases where direct appeal had been completed prior to its decision. We have found no cases dealing with the question of whether *Mapp* would apply to retrial if a case final when *Mapp* was decided was thereafter re-

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* *People* v. *Miranda*, —— N. Y. 2d ——, vol. 30 No. 16 L. Rep. News January 29, 1969 (N. Y. Ct. App. dec'd January 9, 1969); *People* v. *Baker*, 23 N. Y. 2d 307 (N. Y. Ct. App. 1968); *People* v. *Pohl*, 23 N. Y. 2d —— (N. Y. Ct. App. 1968); *People* v. *Ceforo*, 23 N. Y. 2d 283 (N. Y. Ct. App. 1968); *People* v. *Jackson*, 22 N. Y. 2d 446 (N. Y. Ct. App. 1968); *People* v. *Boone*, 22 N. Y. 2d 76 (N. Y. Ct. App. 1968); *People* v. *Weis*, 30 A. D. 2d 877 (2d Dept. 1968); *People* v. *Burwell*, 30 A. D. 2d 842 (2d Dept. 1968); *People* v. *Bastone*, 30 A. D. 2d 828 (2d Dept. 1968); *People* v. *Cassidy*, 30 A. D. 2d 795 (1st Dept. 1968); *People* v. *McKendall*, 30 A. D. 2d 717 (3rd Dept. 1968); *People* v. *Pilon*, 30 A. D. 2d 365 (3rd Dept. 1968); *People* v. *Balatnicov, et al.*, N.Y.L.J. 1/28/69, p. S12, col. 4 (N. Y. Co. Sup. Ct. CULKIN, J.); *United States ex rel. LaBelle* v. *Mancusi*, —— F. 2d ——, Sl. Sh. Op. #209 Sept. Term 1968, p. 627 (U. S. Ct. App. 2d Cir., dec'd December 3, 1968).

versed on collateral attack. However, where an appeal had been dismissed in January, 1950; but on an appeal from coram nobis raising another issue, petitioner was permitted to reinstate his appeal from his 1948 conviction it has been held that the petitioner may not raise claims of illegal search and seizure on the reinstated appeal. *United States ex rel. Wallen* v. *Warden*, 258 F. Supp. 1012 (S. D. N. Y. 1966).

It has thus become increasingly apparent since this Court's decision in *Johnson* v. *New Jersey*, that a substantial number of cases will be affected by the applicability of *Miranda* on retrial, and so the states that have decided the issue more recently have tended to hold that *Miranda* does not apply, while those that decided the issue earlier held that it did. Listing the states in chronological order, the results are as follows ("Yes" indicates a decision to apply *Miranda* on retrial; "No" indicates a decision not to apply *Miranda* on retrial):

Date	*Decision*	*Jurisdiction*	*Citation*
July 1, 1966	Yes	Wisconsin	*State* v. *Shoffner*[1]
July 11, 1966	Yes	Arizona	*State* v. *Brock*
July 13, 1966	Yes	5th Cir. Ct. of Appeals	*Gibson* v. *United States*
July 14, 1966	Yes	Kansas	*State* v. *McCarther*
July 18, 1966	Yes	4th Cir. Ct. of Appeals	*Moorer* v. *South Carolina*
July 22, 1966	?[2]	Rhode Island	*State* v. *Bradshaw*
Dec. 13, 1966	Yes	Hawaii	*State* v. *Ruiz*
March 3, 1967	Yes	Kentucky	*Creech* v. *Commonwealth*
March 27, 1967	No	Delaware	*Jenkins* v. *Delaware*
May 3, 1967	?[2]	9th Cir. Ct. of Appeals	*Amsler* v. *United States*

[1] All of these cases have been cited in previous footnote on pp. 2-4. Therefore, "*supra*" is to be understood following citations.

[2] The Supreme Court of Rhode Island specifically refused to reach the question of whether *Miranda* applies on retrial but gives a rationale for so applying it. 221 A. 2d 817, note 1.

Date	*Decision*	*Jurisdiction*	*Citation*
May 22, 1967	Yes	3rd Cir. Ct. of Appeals	*Virgin Islands* v. *Lovell*
June 20, 1967	Yes[4]	North Carolina	*State* v. *Jackson*
June 22, 1967	No	Illinois	*People* v. *Worley*
July 7, 1967	No	New Jersey	*State* v. *Vigliano*
July 10, 1967	Yes	California	*People* v. *Doherty*
Dec. 12, 1967	Yes	Indiana	*Dell v. State*
Jan. 24, 1968	No	Maryland	*Boone* v. *State*
Jan. 26, 1968	Yes	9th Cir. Ct. of Appeals	*United States ex rel. Walker* v. *Young*
Jan. 31, 1968	No—O.K.[5]	3rd Cir. Ct. of Appeals	*Vigliano* v. *Thevos*
March 29, 1968	No	Tennessee	*Patten* v. *State; Murphy* v. *State*
May 22, 1968	No[6]	North Carolina	*State* v. *Branch; State* v. *Lewis*
May 23, 1968	Yes[7]	Alabama	*Smith* v. *State*
July 2, 1968	No	New York	*People* v. *Sayers*
August 29, 1968	Yes[8]	7th Cir. Ct. of Appeals	*United States* v. *Phillips*

[3] The 9th Circuit Court of Appeals suggested without deciding that *Miranda* be applied on retrial. 381 F. 2d 37, 49. Also see subsequent 9th Circuit decision *United States* v. *Young* listed on the chart *infra*.

[4] But see *State* v. *Branch* and *State* v. *Lewis* in which North Carolina changed its mind and holds that *Miranda* should not apply on retrial. Chart *infra*.

[5] While the 3rd Circuit did not change its rule applying *Miranda* on retrial (see *Virgin Islands* v. *Lovell, supra*), it held that New Jersey had the right to make a contrary rule.

[6] Compare this decision with the previous one to apply *Miranda* on retrial. *State* v. *Jackson, supra*.

[7] The Supreme Court of Alabama held that it was not free to decide whether *Miranda* applied on retrial, but was bound by the Court of Appeals for the 5th Circuit. *Gibson* v. *United States, supra*.

[8] The Court of Appeals held that *Miranda* should have applied in the trial of this case, but it did not decide whether that trial was the original or a retrial. 401 F. 2d 301, 307.

On examination of the decisions by the various courts on this issue certain patterns become clear. Most of the states which applied *Miranda* to retrials decided the case shortly after this Court's decision in *Johnson*. Subsequently, the decision in *Stovall* v. *Denno*, 388 U. S. 293 made the relevant date that of the lineup, rather than trial and thus insured that the decisions in *United States* v. *Wade*, 388 U. S. 218 and *Gilbert* v. *California*, 388 U. S. 263 would not be applied on retrials.

The purpose of *Stovall*, as the purpose in *Johnson*, was to change a previously valid investigative practice. By demonstrating that retrospectivity of a new constitutional interpretation can be limited so as not to affect certain future trials, the 1967 decision in *Stovall* v. *Denno* was an important precedent to the jurisdictions that thereafter were presented with the question of whether *Miranda* should be applied to retrials.

Petitioner contends that the judicial process would be "visibly imperfect" if it were to permit a court to apply different measures of admissibility of confessions (to wit: voluntariness and *Miranda*) at the same time (petr's br. p. 21). However, a separate standard of voluntariness is regularly applied by all courts considering collateral attacks on pre-*Miranda* convictions. Specifically when the determination of the admissibility of a confession in such a case has not met the requirements of *Jackson* v. *Denno*, 378 U. S. 368, it has been held that the standard to be followed in the *Jackson* hearing is that of voluntariness of the confession. *Carter* v. *Eyman*, 281 Fed. Supp. 776 (D. Ariz. 1968). Also see *State* v. *Milow*, 199 Kan. 576, 433 P. 2d 538 (Sup. Ct. Kan., 1967); *In Re Lopez*, 62 A. C. 380, 42 Cal. Rptr. 188, 398 P. 2d 380, 383 (Sup. Ct. Cal. 1965).

The only case which suggests a contrary rule is the District Court's decision in *United States ex rel. Pierce* v. *Pinto*, 259 F. Supp. 729 (D. N. J. 1966), *aff'd per curiam*

on orig. op. 374 F. 2d 472 (3rd Cir 1967). Judge Wortendyke held that the fact that the trial judge made his finding of voluntariness in the presence of the jury violated the standards of *Jackson* v. *Denno, supra*. He ordered that a new trial be held because a jury might have been prejudiced by this determination. He further held that at such a hearing the confession would be inadmissible unless the interrogation had complied fully with the standards of *Miranda* enunciated seven years thereafter. He relied on *Gibson* v. *United States, supra*, for the proposition that the standards of *Miranda* apply on retrial. Since this Court reversed on the ground that neither a new trial nor a post-conviction hearing was required it did not reach the issue of the applicability of the *Miranda* rules. *Pinto* v. *Pierce*, 389 U. S. 31.

California, which has applied *Miranda* on retrial (*People* v. *Doherty, supra*) is nonetheless developing an entire jurisprudence distinguishing between the question of voluntariness and that of compliance with the *Miranda* rules for interrogation. For instance, on a habeas corpus application, the California Supreme Court found errors in a defendant's separate trial on the issue of penalty and ordered a retrial of that issue. *In Re Jackson*, 61 Cal. 2d 500, 39 Cal. Rptr. 220, 393 P. 2d 420 (Sup. Ct. Cal. 1964). That retrial was held before a judge and consisted of the introduction of the transcripts of the prior trials of guilt and of penalty. On his appeal from the decision reimposing the death penalty, Jackson claimed a violation of his rights under *Escobedo* and *People* v. *Dorado*, 62 Cal. 2d 338, 42 Cal. Rptr. 169, 398 P. 2d 361 (Sup. Ct. Cal. In Banc 1965) by the introduction of the transcripts of his confession and testimony at his originl trial on the issue of guilt. The State Supreme Court (*People* v. *Jackson*, 60 Cal. Rptr. 248, 429 P. 2d 600 [Cal. Sup. Ct. In Bank 1967]) held that although the standards of *Escobedo* and *Dorado* apply on retrial (*People* v. *Doherty, supra*), this retrial was limited to the issue of penalty. Therefore, the admissibility of

Jackson's admissions at his trial on the issue of guilt are to be judged on their voluntariness; but when the transcripts of that trial are used on a retrial concerning the penalty, those admissions and the testimony which was the fruit of those admissions are to be judged by the standards enunciated in *Escobedo* and *Dorado*. It is to be presumed that on Jackson' second retrial of the issue of penalty, the admissibility of that evidence would also be measured by the standards of *Miranda*. In his partial dissent, Justice Peters criticizes the unrealistic distinction between the retrial on the issue of guilt and the retrial on the issue of penalty. *Id.* at 603.

California also has held that a failure to object to a confession as violative of the standards of *Miranda* constitutes a waiver, where such a failure would not constitute a waiver of the issue of voluntariness. The rationale for that distinction is that the former violation is less offensive than the latter, a proposition for which *Johnson* v. *New Jersey, supra* is cited. *People* v. *Castro*, 65 Cal. Rptr. 62, 64 (Ct. App., 2d Dist., Div. 3, 1968); *People* v. *Marquez*, 66 Cal. Rtpr. 615, 621 (Ct. App. 2d Dist. 1968).

It thus is apparent that distinction between coercive interrogation and that which does not meet the positive requirements of *Miranda* are developing whether or not *Miranda* is applied to retrials. In fact, this distinction might well be more "visible" in jurisdictions which have applied *Miranda* retrospectively to retrials. In such jurisdictions there might also be a tendency to assess pre-*Miranda* interrogations less strictly than would be the case if the interrogators were on notice of *Miranda's* requirements thereby setting precedent for an unnecessarily stringent interpretation of *Miranda*.

CONCLUSION

For the foregoing reasons the judgment of the Supreme Court of the State of Deleware that the standards of Miranda v. Arizona did not govern the retrial in this case should be affirmed.

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February, 1969

Respectfully submitted,

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